



## Final Regulation Agency Background Document

<b>Agency name</b>	Board of Funeral Directors and Embalmers, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC65-20-10 et seq.
<b>Regulation title</b>	Regulations of the Board of Funeral Directors and Embalmers
<b>Action title</b>	Requirements for crematories
<b>Date this document prepared</b>	12-8-08

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.*

The Board is proposing standards for crematories that are registered or are a part of a licensed funeral establishment to include requirements for: 1) a manager of record who is a certified crematory operator and who is responsible for compliance with state and federal rules for crematories; 2) certification of all persons who operate a retort; 3) due diligence in the identification of the remains and authorization to cremate; 4) safe and ethical operation of a crematory; 5) handling of human remains; and 6) recordkeeping.

### Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

On December 2, 2008, the Board of Funeral Directors and Embalmers adopted final amendments for 18VAC65-20-10 et seq., Regulations of the Board of Funeral Directors and Embalmers for registration and practice of crematories.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

**Chapter 24** establishes the general powers and duties of health regulatory boards including the responsibility of the Board of Funeral Directors and Embalmers to promulgate regulations, levy fees, administer a registration and renewal program, and discipline regulated professionals.

*§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:*

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations...*

In addition to the general powers and duties of a health regulatory board, the Board of Funeral Directors and Embalmers has specific statutory authority as follows:

***§ 54.1-2803. Specific powers and duties of Board.***

*In addition to the general powers and duties conferred in this subtitle, the Board shall have the following specific powers and duties to:*

1. ***Establish standards of service and practice for the funeral service profession in the Commonwealth.***
2. ***Regulate and inspect funeral service establishments, their operation and licenses.***
3. *Require licensees and funeral service interns to submit all information relevant to their practice or business.*
4. *Enforce the relevant regulations of the Board of Health.*
5. *Enforce local ordinances relating to funeral service establishments.*
6. *Advise the Department of Health Professions of any training appropriate for inspectors serving as the Board's agents.*
7. *Establish, supervise, regulate and control, in accordance with the law, programs for funeral service interns.*
8. *Establish standards for and approve schools of mortuary science or funeral service.*
9. *Regulate preneed funeral contracts and preneed funeral trust accounts as prescribed by this chapter, including, but not limited to, the authority to prescribe preneed contract forms, disclosure requirements and disclosure forms and to require reasonable bonds to insure performance of preneed contracts.*
10. ***Inspect crematories and their operations.***

**Purpose**

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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As a result of the work of a Task Force on Cremation laws and regulations, the Board has amended its regulations for the practice of funeral services to establish standards for crematories and the persons who operate them. While the Board has authority to oversee and inspect crematories, it has not had regulatory standards by which to determine that a facility is not operating in a manner that ensures the integrity of the cremation process and protects those who may come in contact with dead human remains. The goal of the regulatory action is to establish some accountability for the facility, standards for clear identification of remains and authorization to cremate, acceptable and safe cremation practices, and appropriate training for operators to protect the health, safety and welfare of the consuming public.

**Substance**

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

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The Board has amended existing regulations to establish the following requirements in regulations governing crematories:

- o Crematory to name a manager of record

- Training for operators of the crematory, including OSHA standards
- A funeral service licensee to obtain authorization to cremate and the content of an authorization form
- A method for identification of remains
- Maintenance of documentation
- Standards for proper storage of remains prior to cremation
- A permit to operate the crematory for agencies such as the Department of Environmental Quality
- Acceptable cremation practices, including prohibition on multiple cremations at one time
- A preclusion of the cremation of non-human remains in same retort
- Removal and disposal of radioactive devices and other non-biological materials and devices
- Certification of crematory operators

The Board is acting within its statutory authority to establish standards for the practice of funeral service, including cremation and to determine the qualifications to enable any person to engage in the practice of funeral service and the operation of a funeral service establishment, including a crematory. Standards are necessary to ensure that there is a responsible party for the operation of the crematory and that operators are properly trained for the safe operation of the retort, including meeting OSHA and DEQ standards to protect the employees of the establishment but also persons in the community. Other requirements will ensure that cremation is not performed on the wrong remains or against the wishes of the next-of-kin. With additional regulatory standards, inspectors will be able to ensure cremation is practiced in a manner that respects the dignity of human remains, provides assurance to families, and protects the health and safety of those who may be affected by the practices of a crematory.

**Issues**

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If there are no disadvantages to the public or the Commonwealth, please indicate.*

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- 1) The primary advantage to the public would be greater assurance that a cremation would be handled properly, that human remains would not be mixed with non-human, that due diligence would be taken to ensure the correct remains are cremated, and that operators would be adequately trained and crematories accountable. There are no disadvantages because the cost of certifying operators (approx. \$500) should not increase the cost of cremations.
  - 2) The primary advantage to the Commonwealth and the agency would be the establishment of standards by which a crematory can be judged. The Board currently has statutory authority to inspect crematories but no regulatory standards by which to base a finding or require a correction. There are no disadvantages to the agency.
  - 3) There are no other pertinent matters of interest.

**Changes made since the proposed stage**

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.*

<b>Section number</b>	<b>Requirement at proposed stage</b>	<b>What has changed</b>	<b>Rationale for change</b>
436 A	In accordance with 54.1-2818.1, visual identification of remains prior to cremation	Acknowledgement that referenced Code section allows for cremation without identification after a 24-hour waiting period.	Consistency with the Code and to address concerns about situations in which visual identification may be impossible or to difficult.
426 B	Refrigeration of remains if not cremated <i>immediately</i> after crematory has taken possession	The time frame of “immediately” was changed to “within 24 hours.”	If “immediately” was interpreted literally, a funeral establishment would be unable to deliver two or more bodies to a crematory that might be located miles away because only one body could be “immediately” cremated. The intent of the regulation was to prevent unrefrigerated remains from being stored for some period of time at the crematory awaiting cremation. If a crematory is not operationally able to cremate within 24 hours and does not have refrigeration available, it should inform a funeral establishment that it is unable to assume custody at the present time.
436 C	Cremated remains must be placed in a plastic bag inside a rigid container.	Allows alternatives for biodegradable containers and scattering containers	A biodegradable container is intended to do just that; to have remains placed in a plastic bag inside such a container defeats the purpose. Likewise, a scattering container is designed for easy access to the ashes, and a plastic bag may interfere with the scattering.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Mike Doherty, representing the	Supports the regulations that do not require a crematory located in a cemetery	The regulations clearly state that the time limit on maintaining unrefrigerated remains begins once the

Virginia Cemetery Association	to be a licensed establishment if it only cremates for licensed establishments and not for the general public. As such, regulation 436 (B) (5) may need to be clarified to say that refrigeration of the remains prior to cremation may be located at the funeral service establishment.	crematory has taken custody. As long as the remains are kept within the funeral establishment, the crematory is not responsible for refrigeration. The time limit was changed from “immediately” to “within 24 hours” so there is sufficient time for the crematory to complete the cremation after taking custody. If unable to complete cremations within 24 hours, the crematory should take custody of additional remains.
<b>Mike Doherty</b> , representing Fairfax Memorial Funeral Home	Requested that regulation 436 (C) (1) be clarified to say that a cremation container is not required if the funeral home makes the removal to the funeral home and cremates on-site.	The Board reiterated that the remains should be in some type of container; even a simple combustible bag is sufficient.
<b>Blair Nelsen</b>	<p>– Asks for further clarification of the following: 18VAC65-20-436 Para A, the requirement that the cremation authorization form include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. There are circumstances in which identification by viewing the remains or by a photograph would be very difficult or even impossible.</p> <p>Para C. 2, the requirement that cremated remains be placed in a plastic bag inside a rigid container ” Should there be an exception for biodegradable urns or scattering urns?</p>	<p>The Code of Virginia (54.1-2818.1) requires either visual identification or a 24-hour waiting period. Regulations have been amended in the final adoption to clarify that alternative.</p> <p>Regulations were amended accordingly.</p>
<b>Dr. Samuel Peters</b>	Regulations will help to some degree.	The Board accepts the comment.

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10	n/a	Sets definitions for words and terms used in regulations	Adds a definition for the term “cremation container” as used in the standards for crematories.
60	n/a	Sets out requirements for accuracy of information	Includes crematories in the requirements for informing the Board of changes of address, and in the provision that notices required to be mailed to

			<p>any registrant are validly given when sent to the address on file.</p>
<p>435</p>	<p>n/a</p>	<p>Sets out requirements for registration of a crematory</p>	<p>Amended regulations require the owner of a crematory to designate a manager of record for the facility on the application.</p> <p><i>As with funeral establishments, it is essential to have <u>a</u> person designated as the responsible party. If an owner meets the qualifications of a manager, he may designate himself or herself, rather than an employee.</i></p> <p>The regulation further specifies that the owner of the crematory cannot abridge the authority of the manager of record relating to compliance with the laws governing the practice of funeral services and regulations of the board.</p> <p><i>Since the manager of record is accountable to the Board for compliance with law and regulation, regulations would prohibit the owner from setting policies or giving instruction that would result in non-compliance.</i></p> <p>B. Every crematory, regardless of how owned, shall have a manager of record who has achieved certification by the Cremation Association of North America (CANA), the International Cemetery, Cremation and Funeral Association (ICCFA), or other certification recognized by the board and who has received training in compliance with requirements of the Occupational Health and Safety Administration (OSHA). Every manager of record registered by the board prior to (the effective date of this section) shall have one year from that date to obtain such certification.</p> <p><i>Certification will ensure that a manager is properly trained in all aspects of operating a crematory in compliance with law and regulation. The only certifications that the Board is currently aware of are CANA and ICCFA. Most crematory operators obtain CANA certification, but the ICCFA is another option. OSHA training is essential to ensure that the crematory is operating and dead human remains are being handled in compliance with occupational health and safety rules.</i></p> <p>C. The manager shall be fully accountable for the operation of the crematory as it pertains to the laws and regulations governing the practice of funeral services, to include but not be limited to:</p> <ol style="list-style-type: none"> <li>1. Maintenance of the facility within standards</li> </ol>

		<p>established in this chapter;</p> <p>2. Retention of reports and documents as prescribed by the board in 18VAC65-20-436 during the period in which he serves as manager of record; and</p> <p>3. Reporting to the board of any changes in information as required by 18VAC65-20-60.</p> <p><i>The manager of record is held accountable for compliance with laws and regulations pertaining to the operation of the crematory. The regulations in subsection C specifically list maintenance of the facility, retention of records and reporting to the Board.</i></p> <p>D. All persons who operate the retort in a crematory shall have certification by the Cremation Association of North America (CANA), the International Cemetery, Cremation and Funeral Association (ICCF), or other certification recognized by the board. Every operator in a crematory registered by the board prior to (the effective date of this section) shall have one year from that date to obtain such certification. Persons receiving training toward certification to operate a retort shall be allowed to work under the supervision of an operator who holds certification for a period not to exceed six months.</p> <p><i>Certification is necessary to ensure that everyone who is an operator in a crematory is properly trained on identification of the remains, proper handling of remains, operation of the retort, etc. The Cremation Association of North American will come to Virginia and conduct training sessions throughout the state in order to get operators certified, once certification is a requirement. They will also conduct training in funeral facilities that operate crematories to continue providing opportunities for certification. Persons who hold CANA certification and have attended CANA operator training within the last five years are allowed to train others for certification. Regulations would allow all operators one year to become certified and would allow a person to work for up to six months while receiving training toward certification.</i></p> <p><i>CANA has been providing crematory operator certification for industry personnel for many years. They have developed a core curriculum, and have added modules to the program based on the specific</i></p>
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			<p><i>regulatory requirements of individual states. The program is scheduled in various locations around the country, and this year CANA has begun offering the training at select mortuary schools throughout the United States. They also have partnered with state regulatory boards to offer the certification program in a specific state which has recently adopted certification regulations. The most current example of such a partnership occurred in New York State, where CANA certified hundreds of crematory operators in four locations in NY state following a regulatory change which called for mandatory training of all operators statewide. The CANA Certification Committee can evaluate the Virginia regulations and create a program that will address specific requirements.</i></p>
n/a	436	n/a	<p><b>Sets the standards for registered crematories or funeral establishments that operate a crematory</b></p> <p>A. Authorization to cremate.</p> <p>In accordance with § 54.1-2818.1, a crematory shall require a cremation authorization form executed in person or electronically in a manner that provides a copy of an original signature of the next-of-kin or the person designated pursuant to § 54.1-2825. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. The identification attestation shall either be given on the cremation authorization form or on an identification form attached to the cremation authorization form.</p> <p>Added at the final stage for consistency with the Code: <u>In the event visual identification is not made, a crematory shall observe a 24-hour waiting period between the time of death and the cremation pursuant to § 54.1-2818.1 of the Code of Virginia</u></p> <p><i>One of the most critical aspects of cremation is the assurance that the remains are properly identified and that cremation has been appropriately authorized. The law requires “visual identification” before a cremation can be carried out, so the authorization to cremate must include an attestation that the identification has been carried out. Identification attestation can be on a separate form or can be a part of the cremation authorization form signed by the next-of-kin or person designated to make final arrangements for disposition of the body. Having written authorization is essential to</i></p>

		<p><i>provide a record that the cremation was legally authorized and that the correct remains have been cremated.</i></p> <p>B. Standards for cremation. The following standards shall be required for every crematory:</p> <ol style="list-style-type: none"> <li>1. Every crematory shall provide evidence at the time of an inspection of a permit to operate issued by the Department of Environmental Quality (DEQ).</li> <li>2. A crematory shall not knowingly cremate a body with a pacemaker, defibrillator or other potentially hazardous implant in place.</li> <li>3. A crematory shall not cremate the human remains of more than one person simultaneously in the same retort, unless the crematory has received specific written authorization to do so from the person signing the cremation authorization form.</li> <li>4. A crematory shall not cremate non-human remains in a retort permitted by DEQ for cremation of human remains.</li> <li>5. Whenever a crematory is unable to cremate the remains <del>immediately</del> <u>within 24 hours</u> upon taking custody thereof, the crematory shall maintain the remains in refrigeration at 40 degrees Fahrenheit or less, unless the remains have been embalmed.</li> </ol> <p><i>All of the standards in subsection B are part of the CANA model law and are consistent with other states rules for cremation. The Board relied on the model law and the cremation law and regulation in North Carolina. Immediately was changed to 24 hours to allow a funeral establishment to make a delivery of more than one remains.</i></p> <p>C. Handling of human remains.</p> <ol style="list-style-type: none"> <li>1. Human remains shall be transported to a crematory in a cremation container and shall not be removed from the container unless the crematory has been provided with written instructions to the contrary by the person who signed the authorization form. A cremation container shall substantially meet all the following standards:             <ol style="list-style-type: none"> <li>a. Be composed of readily combustible materials suitable for cremation;</li> <li>b. Be able to be closed in order to provide complete covering for the human remains;</li> <li>c. Be resistant to leakage or spillage; and</li> <li>d. Be rigid enough for handling with ease.</li> </ol> <p><i>The standards for a cremation container are consistent with other states' requirements and with model laws from CANA and ICCFA.</i></p> </li> <li>2. No crematory shall require that human remains be</li> </ol>
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		<p>placed in a casket before cremation nor shall it require that the cremains be placed in a cremation urn, cremation vault or receptacle designed to permanently encase the cremains after cremation. Cremated remains shall be placed in a plastic bag inside a rigid container provided by the crematory or by the next-of-kin for return to the funeral establishment or to the next-of-kin. Added at the final stage: <u>If cremated remains are placed in a biodegradable container, a biodegradable bag shall be used. If placed in a container designed for scattering, the cremated remains may be placed directly into the container if the next-of-kin so authorized in writing</u></p> <p><i>For the consumers' protection, the crematory is protected from requiring the purchase of a container for the cremains, but it is required to enclose them in a plastic bag inside a rigid container which the consumer may provide or purchase.</i></p> <p>3. The identification of the decedent shall be physically attached to the remains and appropriate identification placed on the exterior of the cremation container. The crematory operator shall verify the identification on the remains with the identification attached to the cremation container and with the identification attached to the cremation authorization. The crematory operator shall also verify the identification of the cremains and place evidence of such verification in the cremation record.</p> <p><i>Due diligence is critical in the cremation process to avoid situations in which the wrong person has been cremated.</i></p> <p>D. Recordkeeping. A crematory shall maintain the records of cremation for a period of 3 years from the date of the cremation that indicate the name of the decedent, the date and time of the receipt of the body, and the date and time of the cremation and shall include:</p> <ol style="list-style-type: none"> <li>1. The cremation authorization form signed by the person authorized by law to dispose of the remains and the form on which the next-of-kin or his designee has made a visual identification of the deceased;</li> <li>2. The permission form from the medical examiner;</li> <li>3. The DEQ permit number of the retort used for the cremation and the name of the retort operator; and</li> <li>4. The form verifying the release of the cremains, including date and time of release, the name of the</li> </ol>
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			<p>person and the entity to whom the cremains were released and the name of the decedent.  <i>In order for inspectors to verify compliance with laws and regulations and to verify the identification of cremains should a question arise, the proposed rules require maintenance of records for at least 3 years. Many establishments will maintain cremation records even longer.</i></p>
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**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

The Board appointed a Task Force on Cremation to look at the issues and problems with cremation and crematories, not only in Virginia but nationally. There have been some egregious and well-publicized examples of the failure of crematories and their operators to act in an ethical and appropriate manner. Bodies have been left uncremated, animal remains have been mixed with human remains and the wrong body has been cremated. The Task Force consisted on four board members, representatives of the Virginia Cemetery Association, the Virginia Morticians Association, the Virginia Funeral Director’s Association, the Independent Funeral Directors of Virginia, and persons who own crematories and funeral establishments with crematories.

To attempt to protect the public in Virginia from such incidences, the Board believes it must be proactive in establishing standards. The Task Force has met on five occasions to review the model regulations of the Cremation Association of North America (CANA) and to look at laws and regulations in other states, such as Maryland and North Carolina.

In a letter dated April 23, 2007, the Senior Policy Analyst for the Department of Health Professions inquired of the Board’s Counsel whether it had statutory authority to regulate certain aspects of the identification and cremation process. In a response from the Assistant Attorney General, the Board was advised that it did not have authority to establish a next-of-kin hierarchy for the disposition of remains nor the authority to grant a limitation on liability for cremation-related activities. Both matters are statutory and would need to be dealt with through introduction of legislation. Therefore, the proposed regulations are limited in scope to those requirements which the Office of the Attorney General has advised are within the legal authority of the Board.

There were two regulatory changes identified in the Notice of Intended Regulatory Action that were not included in the proposed regulations:

- Standards for disposal of unclaimed remains – In response to the NOIRA, the Board received a letter from Dr. Fierro, the Chief Medical Examiner for the Commonwealth. She asked that the proposed standards require return of cremains of unclaimed and unidentified bodies to the Sheriff of a locality to be retrievable at some later date if kin appear. She also requested for a prohibition on the cremation of unidentified bodies that are victims of homicide since the remains may need to be retrieved if there is dispute over the original autopsy findings. The Board determined that the issue raised by the ME were beyond the scope of its regulatory action, would require further consultation with local law enforcement agencies and medical examiners, and may necessitate changes to the Code.
- A waiting period after death prior to cremation (with religious practice exception) – Following the model rules on cremation, the Board originally intended to include a 48-hour waiting period for cremation to ensure proper identification, etc. There would be an exemption for religious groups in which immediate burial or disposition is required. In discussion of the rule, the consensus was that a regulation was unnecessary since the process of obtaining a death certificate and authorization to cremate typically takes at least 48 hours.

### Family impact

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

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There is no impact on the institution of the family and family stability.